This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 11/18/02.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
CHERYL HAMMER,	)	
	)	**CHARGE: 1994 CH 2727**
Complainant,	)	**EEOC:**
	)	**ALS NO: 9868**
	)	
and	)	
DR. RAFFI TURIAN,	)	
Respondent.		

RECOMMENDED ORDER AND DECISION

This matter comes on to be heard pursuant to Respondent's, Dr. Raffi Turian's Motion for Summary Decision, Motion to Strike and Motion Requesting Certification for Interlocutory Appeal & Requesting that the Instant Matter Be Stayed. Complainant, Cheryl Hammer, filed Responses to the Motion for Summary Decision and Motion to Strike and Respondents filed Replies. This matter is ready for decision.

Statement of the Case

On May 6, 1994, Complainant filed Charge No. 1994 CH 2727 with the Illinois Department of Human Rights (IDHR), alleging sexual harassment in higher education pursuant to Section 5A of the Human Rights Act. The named Respondents were Dr. Raffi Turian and University of Illinois at Chicago (UIC).

A document entitled "Notice of Complainant's Unperfected Charge of Housing Discrimination" was filed on May 6, 1994. A corrected copy, entitled "Unperfected Charge of Sexual Harassment in Higher Education", was filed on May 20, 1994. Both

unperfected charges included Turian and UIC as Respondents. Complainant's perfected charge was filed on May 25, 1994. Complainant filed a Complaint of Civil Rights Violation on March 25, 1997.[1] A Notice of Substantial Evidence was issued by IDHR on December 19, 1996 as to Respondent Dr. Raffi Turian, and a Notice of Dismissal was issued on that same date as to charges against Respondent UIC, citing lack of substantial evidence. Subsequently, Complainant filed a First Amended Complaint on September 2, 1999, alleging sexual harassment in higher education, in violation of Section 5A-102 (A) of the Human Rights Act.

Motion to Strike

Respondent seeks to strike Exhibits A, B, C, D, E, F, G and N, attached to Complainant's Response to Respondent's Motion for Summary Decision, on the grounds that they are incompetent evidence, and do not comport with Supreme Court Rule 191(A).[2] Respondent also seeks to strike Exhibit A (a complaint brought by Complainant before the Chicago Commission on Human Relations) on the grounds that it is outside of jurisdictional timeliness, and it is brought in another forum by which it was dismissed.

Finally, Respondent seeks to strike Exhibits A, B1, B2, and C1-6, attached to Complainant's Response to the Motion to Strike, on the grounds that they are in violation of this tribunal's April 3, 2002 order.

[1] Respondent filed a Motion to Dismiss Complainant's original complaint and a Motion to Strike certain paragraphs of that complaint. Both Motions were denied on July 23, 1999.

[2] Respondent also seeks to strike the journal entries in Exhibit B on the grounds that they were prepared in anticipation of litigation, (Respondent's Motion to Strike, Instanter, at 9). However Respondent offers no evidence of this, so it will not be addressed.

Commission Rule 5300.750 states that "[a]ll testimony and other evidence shall be subject to the same rules of evidence as are applicable in courts of record in the State of Illinois". Illinois Supreme Court Rule 191 states:

> . . .Affidavits in support of and in opposition to a motion for summary judgment . . . shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn, as a witness, can testify competently thereto. . .

Exhibit A

Respondent seeks to strike Exhibit A, a complaint filed by Hammer with the City of Chicago Commission on Human Relations, on the grounds that it is irrelevant, immaterial, outside jurisdictional timeliness, and that it was brought in and dismissed from, another forum. Complainant seeks to use Exhibit A as an affidavit, to defeat the instant Motion for Summary Decision.

The Appellate Court in Cano v. Village of Dolton, 250 Ill. App. 3d 130, 620 N.E.2d 1200, 189 Ill. Dec. 883 (1993) specifically rejected the use of a signed, notarized charge as a substitute for a counter-affidavit in a motion for summary decision, This certainly extends to a signed notarized complaint, filed with another tribunal. Therefore, Exhibit A will be stricken.

Exhibit B

Exhibit B, an affidavit of Complainant, contains statements that comport with Supreme Court Rule 191; they are clearly within her personal knowledge. Further, in ¶ 1,

Hammer testifies to her own state of mind, which is admissible, People v. Keefe, 209 Ill.App.3d 744, 153 Ill.Dec. 825, 567 N.E.2d 1052 (1st District, 1991). However, the admissibility of Hammer's journal entries, attached to Exhibit B, must be addressed. Those entries are plainly hearsay, so in order to be admissible, they must qualify under a hearsay exception.

In order to be admissible as past recollections recorded, Hammer must show that: (1) she once had personal knowledge of the matters; (2) the journal was prepared or adopted by her when it was fresh in her memory; (3) it accurately reflected her knowledge; and (4) she lacks independent recollection of the occurrences, see, Medina v. City of Chicago, 238 Ill.App.3d 385, 179 Ill.Dec. 658, 606 N.E. 2d 490 (1st District, 1992). Illinois courts have found that a three moth lapse between the event and the recorded recollection is too long, Salicik v. Tassone, 236 Ill.App.3d 548, 177 Ill. Dec. 723, 603 N.E.2d 793 (1992).

Hammer states that she wrote the pre-mid-October 1993 entries (dated Spring 1991 – Fall Semester 1993, pages 1-14 of the journal), in October of 1993. It is unclear when the Fall Semester began, and the Spring Semester occurred more than three months before October of 1993. Consequently, the pre-mid October 1993 entries are not admissible under the past recollection recorded exception to the hearsay rule.

Complainant also seeks to admit her journal by stating that it expresses her then-existing state of mind – another hearsay exception. However, even if the journal came in under this exception, it would not be admitted for the truth of the matters asserted; People v. Olinger, 112 Ill.2d 324, 97 Ill. Dec. 772, 493 N.E.2d 579 (1986). They would have to be admitted for the truth of the matter asserted to be of any use to Complainant regarding

the Motion for Summary Decision. Therefore, pages 1-14 of the journal contained in Exhibit B will not be admitted under the state of mind exception to the hearsay rule.

In addition, Hammer states that Exhibit B is relevant because the instant case alleges a continuing violation. Given that pages 1-14 of the journal are inadmissible hearsay, whether or not they are relevant is inapposite. However the remainder of the journal is admissible as past recollections recorded. Complainant has provided evidence that she had personal knowledge of the matters (¶ 2, Exhibit B), the journal was prepared when the events were fresh in her memory (¶ 4, Exhibit B) it accurately reflects her knowledge (¶ 2, Exhibit B) and that her memory is exhausted *(Exhibit M, attached to Complainant's Response to Respondent's Motion for Summary Decision).*

The information in Exhibit B that occurred outside of the time alleged in the complaint is admissible. While evidence of bad acts not alleged in the instant complaint may not be used to show culpability on a separate occasion, it may be used to prove modus operandi, intent, or motive, see, All Purpose Nursing Service v. The Illinois Human Rights Commission, et al., 205 Ill. App. 3d 816, 563 N.E.2d 844, 150 Ill. Dec. 717 (1st District, 1990).

However, statements by third parties that are contained in the journal, without more, are plainly hearsay, unless they are not offered for the truth of the matter asserted.

- On page 16 of the journal, in the Monday, November 1 entry, Hammer states: "[Dr. Greenwald] suggested Linda Cesario at Affirmative Action". This is not offered for the truth of the matter asserted, but rather to show why Complainant went to Cesario. The statement is admissible.

- On page 18 of the journal, in the November 16 entry, all statements of Linda Cesario are stricken, as they are inadmissible hearsay. The statement of "Roger" is not offered for the truth of the matter asserted; it is admissible.
- On page 19 of the journal, in the November 17 entry, all of Respondent's statements, as told to Complainant by other students, are stricken, as they are inadmissible hearsay. The statement of Mike Kelly is admissible, as it is not offered for the truth of the matter asserted.
- On page 21, in the November 18, 1983 entry, the statement: "He said that he talked to his daughter and asked her what she thought of the University. She said she thought it sucked and that sometimes you work so hard and you don't get a good grade" is stricken, as it is inadmissible hearsay.
- On page 22, in the November 18, 8:15 entry is stricken, as it is inadmissible hearsay.
- On page 26, the February 10, 1994 and February 18, 1994 entries refer to letters written and received by Complainant regarding an apology by Respondent to his students for his classroom behavior. Complainant's statement is sufficient to establish the existence of these letters, and further, they relate to a collateral matter. Therefore, the journal statements are admissible, see, Rybak v. Provenzale, 181 Ill. App. 3d 884, 130 Ill. Dec. 852, 537 N.E. 2d 1321 (2nd District, 1989).

- On page 26, in the February 22, 1994 entry, Complainant relates what "someone told" her. That entire paragraph is stricken, as it is inadmissible hearsay.
- On page 27, in the Friday, April 1, 1994 entry, the statements of Sandy are admissible, as they are not offered for the truth of the matter asserted. The statements of Leah Tubbs are stricken, as they are inadmissible hearsay.
- On page 28 and 29, the statements of Steve Salvato in the Monday, April 11 and Monday April 25 entries are stricken, as they are inadmissible hearsay.
- On page 31, in the May 24, 1994 entry, all statements by Linda Jenkins and Dr. Regalbuto are stricken, as they are inadmissible hearsay.
- On page 32, in the Wednesday, August 3, 1994 entry, all statements by Nema Khosravani are stricken, as they are inadmissible hearsay.

In sum, the journal, beginning at page 15, with the caveats outlined above, is admissible.

Exhibit C

Respondent seeks to strike Exhibit C, an affidavit of Complainant, on the basis that it purportedly states facts that fall outside of the time alleged in the complaint, and contains hearsay.

The information in Exhibit C that occurred outside of the time alleged in the complaint is admissible. While evidence of bad acts not alleged in the instant complaint

may not be used to show culpability on a separate occasion, it may be used to prove modus operandi, intent, or motive, see, All Purpose Nursing Service v. The Illinois Human Rights Commission, et al., 205 Ill. App. 3d 816, 563 N.E.2d 844, 150 Ill. Dec. 717 (1st District, 1990).

However, the following is stricken, as it is conclusory, and/or lacks foundation, and/or is inadmissible hearsay:

1. *As early as Fall Semester, 1991, Professor Turian was very interested in my personal life, more than in my academic life. He was very interested in knowing about my boyfriend, Ken Gillie and my family.*

2. *Spring Semester 1992, at a party at Scott Baker's apartment, Diana Hamilton and I talked about how we didn't think that Dr. Turian behaved appropriately. Her boyfriend and mine, Bruce Stapley, talked about what should be done.*

6. *In Fall, 1992, Michael Scheiwiller and Roger Adami would joke to Dr. Turian that Marla, my roommate, was overweight. . .*

14. *. . .He was not interested in guiding my research.*

Exhibit D

Respondent seeks to strike Exhibit D, an affidavit of Complainant, on the ground that it does not comply with the requirements of Supreme Court Rule 191. Further, he seeks to strike the notes of Linda Cesario, and other documents, attached to Exhibit D, on the ground that they are inadmissible hearsay.

The following portions of the affidavit contained in Exhibit D are stricken, as they are moot[3], and/or conclusory, and/or lack foundation, and/or are inadmissible hearsay:

1. *On November 3, 1993, I met with University of Illinois Affirmative Action officer Linda Cesario to initiate an informal complaint against Respondent Professor Raffi Turian. A copy of Ms. Cesario's investigative file is attached as Exhibit A, produced by UIC pursuant to subpoena. For easy reference, the pages have been numbered in the lower right corner of each.*

[3] Portions of the affidavit are moot because the attachments to Exhibit D are stricken, *infra*..

2. *All the statements attributed to me (indicated F or CH) from the 11/3/93 meeting with Linda Cesario summarized by her on pages 2-4 on Exhibit A were indeed made by me and are true and correct. All the things I described about my feelings then and about Professor Turian's behavior are true and did occur.*

3. *The statements repeated from me by Marla Schwartz to Linda Cesario11/3/93 described on page 6 of Ms. Cesario's file I indeed made, and they are true. I was very upset, because each of the incidents Ms. Schwartz described had occurred, and more.*

4. *When I called Ms. Cesario on November 4, 1993, I described the incident, which occurred that day, in more detail than I had recorded in my journal. According to her notes, Professor Turian not only ran his fingers through my hair and down the front of my shirt, he also hugged me. (Ex. A, page 7, paragraph 2). . .There is a conflict between Ms. Cesario's records of this incident, which she records occurred November 3, and my records, which indicate it occurred November 4. However there is no doubt that the incident occurred.*

5. *It is correct that Bill Newren saw Professor Turian hugging, kissing, and touching me numerous times, for up to a year before November 5, 1993, as described in Ms. Cesario's notes, Ex. A, page 12, par. 2. . .*

6. *. . .as noted in Ms. Cesario's notes, Ex. A, page 14, par 2, par. 4.*

7. *Although I do not now recall the specific incident Tom Conforti described at Little Joe's Bar in Spring Semester 1992, it is exactly the kind of incident which occurred over and over. Professor Turian would put his arm around me or otherwise touch me, uninvited and inappropriately. I am certain that the incident Mr. Conforti described occurred, in approximately the same time period and certainly in the place where he remembered it when he described it to Ms. Cesario 11/8/93, Ex. A, page 15, par.1.*

Regarding the Cesario notes and additional documents, Complainant seeks to admit them as business records, however no affidavit establishing them as such was submitted. Complainant seeks to submit an unverified affidavit with her Response to Turian's Motion to Strike, and asks this tribunal to accept it, in that unverified state.

In the order entered in the case at bar on April 3, 2002, regarding Complainant's Motion for Leave to Respond to the instant Motion to Strike, this tribunal stated:

> The ALJ ruled that Complainant's Motion for Time and Leave to Respond is granted. **ALJ allowed for legal argument only based on documents submitted and no extraneous documents. . .**

(emphasis added). Complainant readily admits that this order specifically barred additional documents from being added to the pleadings regarding the Respondent's Motion for Summary Decision, *(Complainant's Response to Respondent's Motion to Strike, Instanter, at 6)*. During the life of this case, Complainant has been granted many extensions, etc. on the grounds of equity. However, here, it is inexplicable that Complainant failed to attach an affidavit to verify the Cesario notes as business records, and now seeks to verify them with an unverified affidavit. The notes are inadmissible hearsay, and are stricken.

Exhibits E, F, G and N

Respondent moves to strike Exhibits E, F, G, and N, Complainant's Responses to and Supplemental Responses to Interrogatory Requests, on the grounds that they are incompetent evidence to defeat a Motion for Summary Decision.

Regarding motions for summary decision, this tribunal must review the pleadings, depositions, **admissions** and affidavits on file to determine whether there is a genuine issue of material fact, *(735 ILCS 5/2-1005 (c), emphasis added)*. Answers to Interrogatories may be used in evidence to the same extent as a discovery deposition, *(Supreme Court Rule 213(h)*, and discovery depositions may be used as an admission by a party, *(Supreme Court Rule 212(a)(2)*. Therefore, as interrogatory answers may be

used as admissions, and this tribunal must review admissions in order to make its ruling on the Motion for Summary Decision, Exhibits E, F, G, and N are admissible.

Exhibits A, B1, B2, C1-6,
Attached to Complainant's Response to Respondent's Motion to Strike

In the order entered in the case at bar on April 3, 2002, regarding Complainant's Motion for Leave to Respond to the Motion to Strike, this tribunal stated:

> The ALJ ruled that Complainant's Motion for Time and Leave to Respond is granted. ALJ allowed for legal argument only based on documents submitted and no extraneous documents. . .

Complainant readily admits that this order specifically barred additional documents from being added to the pleadings regarding the Respondent's Motion for Summary Decision, *(Complainant's Response to Respondent's Motion to Strike, Instanter, at 6).*

None of the exhibits attached to Complainant's Response to Respondent's Motion to Strike were attached to her Response to Respondent's Motion for Summary Decision. Consequently, pursuant to the April 3, 2002 order, they are stricken. However, Exhibits B1 and B2 are orders issued by this tribunal; judicial notice will be taken of those orders.

Motion FOR SUMMARY DECISION

Contentions of the Parties

Respondent states that when the discovery, and evidence proffered with the Motion for Summary Decision, Response and Reply, are viewed in the light most

favorable to the Complainant, there is no cause of action for sexual harassment in higher education under the Act.

First, Turian asserts that his conduct did not constitute sexual advances or requests for sexual favors. Pursuant to Hammer's deposition testimony, she indicated that the allegation, contained in the First Amended Complaint, that Turian kissed and hugged her on November 4,8,10 and 11, 1993, did not occur. Further, Respondent alleges that Hammer's course of conduct does not indicate that Turian's alleged conduct was unwelcome. Finally, Respondent argues that even if true, Turian's conduct amounts to sporadic, non-severe, non-sexual incidental conduct, and such conduct does not rise to the level of actionable sexual harassment.

Alternatively, Respondent states that Hammer's November 4, 1993 allegation should be stricken, as it fails due to jurisdictional timeliness and the wrongs alleged by Complainant in the instant complaint are isolated incidents of sexual harassment.

Also, Respondent states that Hammer's November 8, 1993 allegation of sexual harassment should be stricken, as Complainant has no independent recollection of the occurrences on that date and cannot therefore that she was sexually harassed on that date.

Next, Turian argues that Complainant cannot establish that the alleged conduct had the purpose of interfering or actually interfered with her educational performance. Respondent provided supportive assistance during her Master's project and improved her grade in a biochemical engineering course.

In addition, Turian states that once he was informed that Hammer had filed an informal sexual harassment charge against him with the University of Illinois at Chicago

(UIC), he made a good faith effort to comply with the terms of the proposed resolution of that charge.

Next, Turian states that he was not sued in his individual capacity, but was sued under respondeat superior, under Section 5A-102(A) of the Act. There is no basis for Turian to be held individually liable as a higher education representative and the essence of the charge Hammer brought against UIC is the same as the instant suit against Turian, therefore Turian should be dismissed from liability in his individual capacity. Alternatively, Turian argues that the allegations made in this case fall short of those that would be required to hold him personally liable pursuant to Section 5A-102(A) of the Act.

Also, Respondent contends that Hammer has suffered no pecuniary losses or hardship, has no factual basis to establish emotional harm, and has suffered no academic harm. Further, Turian asserts that paragraph C[4] of the instant complaint should be stricken, as any finding by this tribunal to that effect would be void, as Respondent has no authority over these records and UIC has been dismissed from the instant case. In addition, Turian argues that paragraph D[5] of the complaint should be dismissed because any finding by this tribunal to that effect would be void because the terms and conditions of Respondent's employment are determined by UIC, which has been dismissed from this case. Also, Respondent seeks the dismissal of paragraph D because pursuant to Complainant, the sexual harassment ceased as of November of 1993.

[4] Paragraph C of the First Amended Complaint states: "That Respondent clear from Complainant's records all references to the filing of this charge, and the subsequent disposition thereof; and provide Complainant with a neutral letter of reference".

[5] Paragraph D of the First Amended Complaint states: "That Respondent cease and desist from discrimination on the basis of sexual harassment in higher education".

Finally, the Respondent seeks dismissal of the portions of the instant complaint that refer to his profiting from a public contract. Turian states that he held no public contract with UIC and that Hammer does not have any information that would lead to the conclusion that he did so.

In her Response, Hammer contends that she has sufficient evidence to establish a cause of action for sexual harassment in higher education, pursuant to Section 5/5-102(A) of the Act. Complainant states that she has presented evidence that Turian made repeated, unwelcome advances toward her, and that his conduct interfered with her educational performance in that she had to change her academic advisor and begin a new research project.

Turian's advances, which included sexual comments, repeated physical touching of Hammer's hair, arms, clothing and breasts (through her shirt), created an intimidating, hostile educational environment. Respondent's conduct was so offensive that Hammer would back away from him, avoid him, and seek an escort when she had to be near him, hoping that a witness would prevent him from engaging in such conduct. Ultimately, she filed a complaint against him with UIC.

Next, Hammer argues that the fact that she continued to participate in the expected activities of her graduate education in order to complete it, while also attempting to stop Respondent's conduct, does not indicate that Turian's conduct was welcome. In fact, the complaint that she filed with UIC is evidence enough that she in fact did not welcome Turian's advances.

Next, Hammer contends that all of her allegations in which she states that she suffered sexual harassment in higher education are within the jurisdictional time period of

180 days, and since this is a continuing violation, only the November 8, 1993 incident -- last one that occurred, is required to be within that 180 days. Further, there is evidence that sexual harassment occurred on that date.

In addition, Hammer contends that although no hugging and kissing occurred on November 4, 8, 10 and 11, 1993, because Turian's conduct was a continuing violation, his unwelcome kisses and hugs are properly alleged in order to apprize him of the complaint against him.

Next, Hammer states that until she realized that it was Respondent's unwelcome advances that were causing her frustration and unhappiness, she considered leaving the study of chemical engineering. She was unable to pass the exam that was required to complete her coursework in 1993 because she was so upset; she had to wait a year and take it in 1994. She passed it at that time.

Further, Complainant states that all of the remedies requested in paragraphs A, B, C, D, F, G and H are available against Respondent and should stand. Complainant states that in addition to being delayed one year in completing her degree, resulting in financial loss, she was emotionally harmed by Respondent's behavior vis a vis her friends, family, and boyfriend.

Moreover, she states that she has evidence that Respondent has an employment contract with UIC, which is a public institution, from which he profited – he received compensation.

Findings of Fact

1. Respondent, Dr. Raffi Turian is a higher education representative.

2. Respondent is a professor in the Chemical Engineering Department at the University of Chicago.

3. In March of 1991, Complainant, Cheryl Hammer, was admitted to the chemical Engineering Program at the University of Chicago.

4. In the Fall Semester of 1993, Complainant took a chemical engineering class that was taught by Respondent.

5. On November 4, 1993, Respondent ran his hand through Complainant's hair, past her shoulder blades, down to her ribs.

6. On November 8, 1993, Respondent walked into class, informed the students that there was no class, and pressed Complainant in the chest.

7. On November 10. 1993, during class, Respondent ran his hand through Complainant's hair, past her shoulder blades, down to her ribs.

8. On November 11, 1993, Respondent placed his hand on Complainant's arm as he walked by her in class.

Discussion

Paragraph 8-106.1 of the Illinois Human Rights Act, 775 ILCS 5/101-1 *et seq*., specifically provides that either party may move, with or without supporting affidavits, for a summary order in its favor. If the pleadings and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a recommended order as a matter of law, the motion must be granted. The Commission has adopted standards used by Illinois courts in considering motions for summary judgment for motions for summary orders, and the Illinois Appellate Court has affirmed this analogy.

Cano v. Village of Dolton, 250 Ill.App3d 130, 620 N.E.2d 1200, 189 Ill.Dec. 833 (1st District 1993).

In considering a motion for summary judgment, reasonable inferences may be drawn from undisputed facts, but must be drawn in the non-moving party's favor where the facts are susceptible of two or more inferences. Purdy Co. of Illinois v. Transportation Insurance Co., Inc., 209 Ill. App. 3d 519, 568 N.E.2d 318, 154 Ill. Dec. 318, (1st District, 1991).

775 ILCS 5/5A-102 provides that it is a civil rights violation "for any higher education representative to commit or engage in sexual harassment in higher education". The Act defines higher education representative as:

> . . .[A]ny member of the faculty of an institution of higher education, including but not limited to . . .a professor or associate or assistant professor and a full or part time instructor or visiting professor. . .

(775 ILCS 5/5A-101(D). The Act defines sexual harassment in higher education as:

> [A]ny unwelcome sexual advances or requests for sexual favors made by a higher education representative toward a student, when such conduct has the purpose of substantially interfering with the student's educational performance or creating an intimidating, hostile or offensive environment; or when the higher education representative either explicitly or implicitly makes the student's submission to such conduct a term or condition of, or uses the student's submission to or rejection of such conduct as a basis for determining:
>
> (1) Whether the student will be admitted to an institution of higher education;
>
> (2) The educational performance required or expected of the student;
>
> (3) The attendance or assignment requirements applicable to the student;
>
> (4) To what courses, fields of study or programs, including honors and graduate programs, the student will be admitted;

(5) What placement or course proficiency requirements are applicable to the student;

(6) The quality of instruction the student will receive;

(7) What tuition or fee requirements are applicable to the student;

(8) What scholarship opportunities are available to the student;

(9) What extracurricular teams the student will be a member of or in what extracurricular competitions the student will participate;

(10)Any grade the student will receive in any examination or in any course or program of instruction in which the student is enrolled;

(11)The progress of the student toward successful completion of or graduation from any course or program of instruction in which the student is enrolled; or

(12) What degree, if any, the student will receive.

(775 ILCS 5/5A-101(E).

When analyzing sexual harassment cases, the typical burden-shifting method of analyzing a discrimination case is not used. Rennison and Amax Coal Co., 31 Ill. HRC Rep. 178, 185 (1987). The Commission has reasoned that the burden-shifting method should not apply because "there can never be a 'legitimate' reason for sexual harassment." Accordingly, if the Complainant can prove that she was subjected to 'sexual harassment' then she has proven a violation of the law, Id.

First, it must be determined on which incidents Complainant could obtain relief. Section 7A-102(A)(1) of the Act provides that a Charge must be filed within 180 days of the alleged act of discrimination. The event that triggers the running of the 180 day period is the alleged discriminatory action taken by respondent, Kress and Milani Foods, Inc., 12 Ill. HRC Rep. 337 (1984). The 180 day filing requirement is a jurisdictional

requirement and it cannot be waived, Lee v. Human Rights Commission, 81 Ill.Dec. 821, 126 Ill. App. 3d 666, 467 N.E.2d 943 (1st District, 1984). The Procedural Rules of the Department require, *inter alia*, that a Charge contain the Complainant's notarized signature under oath or affirmation, *(56 Ill. Admin. Code § 2520.330(e).* Pursuant to the Department's Procedural Rules, a Charge submitted to the Department that lacks the Complainant's notarized signature under oath can be docketed as an "unperfected charge," and the Department would notify the Complainant in writing of the elements that the Complainant must supply, *(56 Ill. Admin. Code § 2520.350).* A complainant who later provides the missing elements of his or her Charge thereby "perfects" the Charge. Pursuant to the Department's Procedural Rules, a perfected Charge relates back to the date of filing of the unperfected Charge, *(56 Ill. Admin. Code § 2520.360(a).*

In the instant case, Complainant filed an unperfected charge on May 6, 1994. November 8, 1993 is 180 days before that date. Therefore any allegations that took place before November 8, 1993 are jurisdictionally barred unless Complainant establishes that they should be included under the continuing violation doctrine.

In her First Amended Complaint, Hammer alleges that Turian sexually harassed her on November 4, 8, 10 and 11, 1993, in that he ran his hands down the front of her blouse, ran his fingers through her hair, and touched her breast, *(Complaint, ¶ 6-10).*[6] In her Response to Respondent's Motion for Summary Decision, Complainant alleges that she was sexually harassed by Turian beginning in early 1991, and that it continued thru 1992, to Fall of 1993, and that all of those incidents are under the Commission's

[6] The complaint also alleges that Turian hugged and kissed Complainant, but she admits that this did not take place on the dates in question, *(Complainant's Response to Motion for Summary Decision, pp.35).*

jurisdiction pursuant to the continuing violation doctrine, *(Complainant's Response to Motion for Summary Decision, pp. 34-35).*

The continuing violation doctrine allows a complainant to get relief for time-barred acts by linking them with acts occurring within the limitations period. When this takes place, the combination of acts are treated as one continuous act that ends within the limitations period, Galloway v. General Motors Service Parts Operations, 78 F.3d 1164, 1167 (7th Circuit 1996).[7] However, "[a] complainant may not base her. . .suit on conduct that occurred outside of statute of limitations unless it would have been unreasonable to expect the complainant to sue before the statute ran on that conduct", Id., at 1167. Complainant may not sue when the conduct that occurred outside of the statute of limitations could constitute or be recognized as actionable harassment, yet she failed to file a timely charge. However, the doctrine may apply when, after an initial incident of discrimination, complainant does not feel sufficient distress to warrant filing a charge, Id.

Complainant's Fall 1992 allegations *(Complainant's Response to Motion For Summary Decision, at 6)* clearly could constitute actionable harassment. And certainly, Complainant's reaction, that in Spring of 1993 she refused to take any course taught by Turian because she did not "feel she could handle another class with him after what she had to go through in fall semester 1992", indicates that she felt distressed by the conduct, *(Complainant's Response to Motion For Summary Decision, at 7).* Consequently, pursuant to Galloway, the continuing violation doctrine does not apply here; Complainant

[7] Federal Court opinions, which interpret analogous federal anti-discrimination statutes, are helpful and relevant, although not binding, in deciding cases bought pursuant to the Illinois discrimination laws. City of Cairo v FEPC, 21 Ill. App. 3d 358, 363, 315 N.E.2d 344 (5th Dist. 1974)

was on notice that she had a cause of action as early as Fall of 1992, yet she failed to file a charge. Complainant cannot obtain relief for the incidents alleged in her Response to the Motion for Summary Decision that occurred prior to November 4, 1993[8].

However, as stated *supra*, regarding the evidence concerning allegations that are jurisdictionally time-barred, while Complainant cannot recover damages for them, testimony concerning those incidents is admissible. Again, while evidence of bad acts not alleged in the instant complaint may not be used to show culpability on a separate occasion, it may be used to prove modus operandi, intent, or motive, see, All Purpose Nursing Service v. The Illinois Human Rights Commission, et al., 205 Ill. App. 3d 816, 563 N.E.2d 844, 150 Ill. Dec. 717 (1st District, 1990).

The next question is whether Complainant has pled sufficient facts to warrant a cause of action for sexual harassment in higher education. Complainant alleges the following to support her claim:

- On November 4, 1993, Respondent ran his hand through Complainant's hair, past her shoulder blades, down to her ribs, *(Complainant's November 30, 2001 Deposition, pg. 92-93, Exhibits B, E and F, attached to Complainant's Response to the Motion for Summary Decision).*

- On November 8, 1993, Respondent walked into class, informed the students that there was no class, and "pressed [her] in the chest", *(Exhibit B, attached to Complainant's Response to the Motion for Summary Decision).*[9]

[8] It should be noted that on March 5, 2001, this tribunal allowed Complainant to include her November 4, 1993 allegations in the complaint under the continuing violation doctrine. There, the November 4, 1993 conduct could be recognized as sexual harassment only in the light of events that occurred later, on November 8, 10 and 11, 1993, which then included allegations that Respondent hugged and kissed Complainant (Complainant now admits that the kissing and hugging did not take place on the dates alleged in the complaint). Since the November 8, 10 and 11, 1993 are within the statute of limitations, regarding the November 4, 1993 allegation, the continuing violation doctrine applied.

[9] Complainant indicates that she has no independent recollection of the events of November 8, 1993, (*Complainant's November 30, 2001 Deposition, pg 90).* So, her interrogatory answers, Exhibits E and F, dated November 28, 2001 and November 13, 2001, respectively, will be disregarded. However, the November 8, 1993 journal entry at Exhibit B is admissible as past recollection recorded.

- On November 10. 1993, during class, Respondent ran his hand through Complainant's hair, past her shoulder blades, down to her ribs, *(Complainant's November 30, 2001 Deposition, pg. 93-94, Exhibits B, E and F attached to Complainant's Response to the Motion for Summary Decision).*

- On November 11, 1993, Respondent placed his hand on Complainant's arm as he walked by her in class, *(Complainant's November 30, 2001 Deposition, pg. 97-98, Exhibits B, E and F attached to Complainant's Response to the Motion for Summary Decision).*

Further, Complainant states that the alleged harassment ended in November of 1993. Also, Dr. Gina Shreve, an Assistant Professor of Chemical Engineering at UIC during the time in question, states, via affidavit, that:

> In late October or early November 1993, I received a telephone from Ms. Hammer. Ms. Hammer was not clear as to why she was calling me. As I recall, it was a rather long conversation. Ms. Hammer indicated to me that she was having "problems", Ms. Hammer told me that Dr. Turian had "brushed" or "touched" her breast. I asked more questions concerning the context in which this incident had occurred. Ms. Hammer indicated that it had been while he was gesticulating with his hands during a conversation or in some similar innocent context. Ms. Hammer told me that she was not certain at the time as to whether the touching had been deliberate. Ms. Hammer indicated to me that it had happened only once. I asked Ms. Hammer whether she had told Dr. Turian that the incident had made her uncomfortable. Ms. Hammer responded that she had not told Dr. Turian of her concerns or that she felt uncomfortable. When I asked why, Ms. Hammer told me that she did not tell Dr. Turian because she thought she could still "use" Dr. Turian. Ms. Hammer at no time stated or implied that she did not tell Dr. Turian because she was afraid to tell him or that she felt intimidated.

(Exhibit H, attached to Complainant's Response to the Motion for Summary Decision).

The threshold issue in any sexual harassment case is whether the instances of harassment alleged by the Complainant rise to the level of hostility so as to be considered actionable conduct, see, Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986). According to the United States Supreme Court in Harris v. Forklift Says., Inc., 114 S.Ct. 367, (1993), a cause of action for sexual harassment based upon a hostile environment arises in a Title VII case:

> when the work place is permeated with discriminatory intimidation, ridicule, and insult **that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.**

Id., at 370, *emphasis added*. The Commission has used a similar standard for evaluating sexual harassment claims under the Human Rights Act, see, Kauling-Schoen v. Silhouette American Health Spas, Ill. HRC Rep. (Charge No. 1986SF0177, February 8, 1993).

In the Act, sexual harassment in higher education is defined as:

> [A]ny unwelcome sexual advances or requests for sexual favors made by a higher education representative toward a student, **when such conduct has the purpose of substantially interfering with the student's educational performance or creating an intimidating, hostile or offensive environment. . .**

(775 ILCS 5/5A-101(E), emphasis added. So the analysis as to whether the level of hostility is pervasive enough to be considered actionable in a sexual harassment in higher education case is similar to that of a sexual harassment case under the Illinois Human Rights Act or Title VII.

Unwelcome conduct of a sexual nature which does not amount to more than several isolated instances will not create liability, Lay and St. Mary's Hospital, 34 Ill. HRC Rep. 197 (1987); Doza and Mid-America Security, Ill. HRC Rep. (1988SF0171, July 26, 1991); Borling and Wildwood Indus., Inc., Ill. HRC Rep. (1988SF0355, January 6, 1995). Further, "[t]he [harassing] incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief.", Kotcher v. Rosa & Sullivan Appliance C enter, Inc., 957 F.2d 59, 62 (2d Cir. 1992).

Given the totality of the circumstances analysis, which must be applied in the case at bar, the incidents alleged in the instant complaint, even if found to be sexual, cannot be said to amount to more than isolated instances. Originally, the hugging and kissing

allegations that were alleged by Complainant tipped the balance in her favor. Now, her acknowledgement that this did not occur on the dates alleged in her complaint reduces her allegations to occasional incidents, which are not actionable.

The admissible pre-November 4, 1993 allegations[10] that are recounted in Complainant's Response to the Motion for Summary Decision do tend to suggest that Turian's actions may have been sexual in nature, but even if they were, the allegations **contained in the complaint** do not give rise to a cause of action for sexual harassment in higher education.

Given this recommendation, the remaining arguments contained in the Motion for Summary Decision, and the Motion Requesting Certification for Interlocutory Appeal & Requesting that the Instant Matter Be Stayed in its entirety, are moot, and need not be addressed.

Conclusions of Law

On the basis of the controlling precedent, statutory authority, the findings of fact and the discussion, I conclude that no material issues fact exist and that Respondent, Dr. Raffi Turian, is entitled to a judgment in his favor as a matter of law.

[10] See, supra, in the Motion to Strike section of this Recommended Order and Decision.

Recommended Order

For the foregoing reasons, I recommend that Respondent's Motion for Summary Decision be GRANTED, and the complaint be DISMISSED in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

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BY:
WILLIAM H. HALL, IV
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: October 9, 2002